

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 05-80955

v.

HONORABLE AVERN COHN

D-19, BENJAMIN HENRY SMITH,

Defendants,

_____/

ORDER DENYING MOTION FOR NEW TRIAL

On December 07, 2007, defendant was found guilty of conspiracy to possess with intent to distribute and to distribute 5 kilograms or more of cocaine, 21 USC §§841 and 846, by a jury. Now before the Court is defendant's Motion For New Trial. Essentially defendant says he was denied a fair trial because in the examination of a witness, Frank Scartozzi, the Internal Revenue Service agent who investigated the case, disclosed that defendant failed to file income tax returns which made defendant out to be a tax evader, which is a felony. Further, defendant argues that he was denied a fair trial because Agent Scartozzi testified as an expert, though not qualified to be, regarding the scope of the conspiracy of which defendant was charged with being a member.

Defendant is wrong. First, the Court did not allow Agent Scartozzi to testify as to the failure of defendant to file tax returns. Defendant's objection to such testimony was sustained. As Agent Scartozzi began testifying regarding the tax returns, defendant did not

initially object. Midway in the testimony defendant did object. The objection was sustained.

The Court advised the jury:

The jury will disregard the testimony on the issue of tax returns.
Let's move forward.

Defendant suffered no prejudice regarding this portion of Agent Scartozzi's testimony.

As to defendant's second objection, the government did offer Agent Scartozzi as an expert for his view of the operation of the Black Mafia Family conspiracy of which defendant was said to be a part. Agent Scartozzi in answer to the question

Was BMF structurally like a legitimate corporation?

responded with a description of what his investigation disclosed. After Agent Scartozzi testified at some length, defendant objected stating

This is his own opinion and conclusion.

The government responded

MS. BECK: Agent Scartozzi was the main IRS case agent who investigated the case over several years, and he is entitled to summary testimony of his investigation and that's what the question is. He just listed all of the managers that he determined. This is a similar question with respect to the drivers.

THE COURT: I'll let him answer.

MR. KRAIZMAN: Very well.

Agent Scartozzi then completed his testimony. The fact that the Court did not state that Agent Scartozzi was an expert and that his testimony was admissible under FRE 702 is of no moment. As explained by the government

It would have been improper for the government to ask the Court to qualify Agent Scartozzi as an expert in front of the jury. However, when the government asked Agent Scartozzi

questions that were based on his expertise, the questions were preceded by "based on your training and expertise" followed by the question. At no time did defendant object to Agent Scartozzi's qualifications as an expert witness. Accordingly, Agent Scartozzi properly testified as an expert.

This evidence taken in a light most favorable to the government was sufficient for the jury to find defendant guilty. For the above reasons, defendant's motion is DENIED.

SO ORDERED.

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: January 10, 2008

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, January 10, 2008, by electronic and/or ordinary mail.

s/Julie Owens
Case Manager, (313) 234-5160